(4)

No. 05-381

2 6 2005

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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BRIEF FOR AMICI CURIAE THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae The Business Roundtable is an association of approximately 160 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $4 trillion in revenues.[1] The executives who created The Business

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or sub-

Roundtable believed that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers of major corporations more directly into public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

The National Association of Manufacturers ("the NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Business Roundtable and the NAM have a strong interest in this issue, as the question presented has enormous practical importance for their members nationwide. The Ninth Circuit has held that a company can be subjected to treble damages under the Sherman Act based on a jury's finding that the company purchased more inputs "than it needed" or paid more "than necessary" for them. Pet. App. 7a n.8. That open-ended inquiry not only is judicially unmanageable, but will deter companies from making efficient purchasing decisions as they seek to adjust to market conditions, all to the ultimate detriment of consumers. The members of the Roundtable and the NAM have long relied on this Court's standards for "predatory pricing" claims set forth in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which make clear that courts and juries are not to engage in such open-ended price regulation. The

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mission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk. Petitioner is a member of The Business Roundtable and the NAM.

Ninth Circuit's departure from *Brooke Group* significantly upsets that reliance, threatening stability and predictability in the law that is essential to productive economic enterprise.

The members of The Business Roundtable and the NAM include numerous companies that routinely buy inputs and sell outputs. Each of these companies must engage in price negotiations and decisions at each stage of the market process—all with an eye toward maintaining efficiency and engaging in the vigorous competition that benefits consumers. By subjecting companies to an unknowable risk of treble damages from efficient and commonplace purchasing decisions, the Ninth Circuit's decision ultimately deprives consumers of the benefits of market efficiencies.

SUMMARY OF ARGUMENT

The Ninth Circuit adopted a dangerous and unworkable rule that subjects purchasing decisions of businesses throughout the Nation to judicial oversight as to whether a company purchased more inputs "than it needed" or paid more "than necessary" for them, thereby preventing a competitor from buying at a "fair price." Pet. App. 7a n.8. That holding, if not corrected, would deter companies from making efficient purchasing decisions to adjust to rapidly-evolving market conditions, thereby fostering inefficiencies that ultimately harm, rather than help, consumers. Because no company could ever predict what a jury, in hindsight, might conclude is a higher price than "necessary" or more inputs than "needed," companies will be deterred from engaging in vigorous purchasing competition and from acquiring critical inputs that may be needed to meet future needs. Courts and juries should not serve as virtually standardless regulators of millions of purchasing decisions that occur every day. The standards set by this Court in *Brooke Group* should apply to any allegation of predatory pricing—whether selling or buying—and the Ninth Circuit erred in disregarding those standards in this case.

This case is of extraordinary national importance. The Ninth Circuit's vague liability standard, if not corrected by this Court, would disrupt efficient market behavior nationwide. Firms must have the flexibility to determine and adjust their prices—both up and down—to accommodate ever-changing economic conditions. That flexibility must apply both to selling and buying decisions, for there are many economically rational reasons why a particular firm might choose to pay more or less for a particular input than a competitor. Moreover, the Ninth Circuit's rule encourages inefficiency and discourages innovation, by holding that a more efficient firm must alter its own pricing decisions to ensure that a less efficient rival is able to perpetuate itself in business. Subjecting pricing decisions to the whim of juries applying a vague fairness test would deter economically beneficial behavior and disrupt the efficient allocation of resources that results from those price signals. The specter of such economic disruption warrants this Court's review.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S VAGUE STANDARD DEPARTS FROM THIS COURT'S PRECEDENTS, WILL CHILL VIGOROUS PRICE COMPETITION, AND IS JUDICIALLY UNMANAGEABLE.

This Court has made clear that businesses are entitled—indeed, encouraged—to engage in above-cost price competition without fear that those pro-competitive actions will subject them to antitrust liability. "The purpose of the [Sherman] Act is not to protect businesses from the working of the market." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993). Therefore, "this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it." *Id.*

In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court noted that ill-defined "predatory" pricing claims might "deter procompetitive con-

duct." *Id.* at 593. The Court agreed with a statement of then-Judge Breyer that courts "must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Id.* at 594 (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)); *see also Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984) (it is "sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects"). Subsequently, and following this reasoning, the Court in *Brooke Group* established a clear standard and high threshold for claims of predatory pricing. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." 509 U.S. at 222. Second, the plaintiff must demonstrate "that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224. In adopting this heavy burden, the Court noted that "predatory pricing schemes are rarely tried and even more rarely successful, and the costs of an erroneous liability finding are high." *Id.* at 226 (citation omitted).

As frequent high-volume purchasers and sellers of products and services, the members of The Business Roundtable and the NAM have long relied on the clear standards of *Brooke Group* and its forebears when engaging in a central activity of any business: determining the prices to be paid or charged. These standards have encouraged efficient market behavior by protecting "management's exercise of independent business judgment." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted); *see also Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (criticizing agreements that " 'cripple the freedom of traders and thereby restrain their ability to sell in accordance with

their own judgment' ") (quoting *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)).

The Ninth Circuit, however, has now jettisoned the *Brooke Group* rule in favor of an unpredictable inquiry that allows a jury to subject a company to potentially crippling liability based on whether that jury believes the company paid more than "necessary" for inputs, bought more than "needed," or subjected a competitor to a price that was not "fair." The Ninth Circuit held that it need not follow the rigorous standards of *Brooke Group* because this case involves allegations of predatory buying rather than predatory selling. This was an error, and one that has the potential to disrupt efficient market behavior nationwide. Companies must be able to rely on predictable and stable legal rules that do not permit juries to second-guess and micromanage daily pricing decisions. That need is no less important when companies are setting prices paid to purchase inputs than it is when they are setting prices received for selling outputs.[2]

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[2] Monopsony (buying side power) is analytically the same as monopoly power (selling side power), and should be so treated under the law. *See Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) ("monopsony pricing * * * is analytically the same as monopoly or cartel pricing and so treated by the law"), *rev'd on other grounds*, 522 U.S. 3 (1997); *Vogel* v. *American Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("monopoly and monopsony are symmetrical distortions of competition from an economic standpoint"); *United States* v. *Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) (Kozinski, J.) (" 'Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side' ") (citation omitted); *see also* Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589, 591 (2005) ("asymmetric treatment of monopoly and monopsony has no basis in economic analysis"); Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 Antitrust L.J. 563, 576 (2005) ("If consumer welfare is

Just as they do in setting the prices at which they sell their own goods and services, companies routinely make purchase-price decisions based on such factors as current and potential future market conditions, business strategies, efficiency concerns, supplier reputation, and expected growth or decline in customer demand. Companies—big and small—require that the rules governing pricing determinations be clear, objective, and predictable. This is especially true for allegations of predatory pricing, where the Court has repeatedly recognized the difficulty in drawing the line between aggressive competition and predation.

Just last Term, the Court cautioned that the risk of false condemnations of business decisions under the antitrust laws can "chill the very conduct the antitrust laws are designed to protect." *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citing *Matsushita*, 475 U.S. at 594). As the Court noted, "[t]he cost of false positives counsels against an undue expansion of § 2 liability." *Verizon*, 540 U.S. at 414. By ignoring the high bar set by *Brooke Group* for predation claims, the Ninth Circuit's nebulous standard subjects businesses to the chilling effect the Court has striven to avoid, to the ultimate detriment of market efficiency and consumer welfare.

Price regulation that is subjective and open-ended is likely to "disrupt the proper functioning of the price-setting mechanism." *FTC* v. *Indiana Fed. of Dentists*, 476 U.S. 447, 461-462 (1986) (condemning agreement that causes party to consider "whether a particular purchase is cost justified"). It is also imperative that antitrust rules "must be clear enough for lawyers to explain them to clients," and must be "administratively workable." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). In formulating antitrust liability standards, courts must consider "what

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the equivalent of allocative efficiency, a buyer power abuse is just as anticompetitive as a seller power abuse.").

advice a lawyer, faced with [that] rule, would have to give a client" and whether the lawyer would have "to point out the risks of suit—whether ultimately successful or not—by an injured competitor." *Barry Wright*, 724 F.2d at 235.

The open-ended nature of the Ninth Circuit's standard ignores all this. Because the Sherman Act's generous venue rules allow any firm conducting business nationwide to be sued in the Ninth Circuit, *see* 15 U.S.C. §§ 15, 22, every such firm must now seek to comply with the Ninth Circuit's rule. Yet no lawyer or company will be able to predict when a jury, exercising hindsight, might find that the company's purchases were a bit too expensive, included a few extra "unneeded" inputs, or resulted in a market price that the jury would view as not "fair" to competitors. And because this fairness standard is apparently relative to the circumstances of others in the market, a firm could not begin to comply without knowing exactly what competitors it is bidding against and the nature of those competitors' own price and cost considerations and supply needs—the kind of information sharing the antitrust laws often discourage.

Thus, while the Ninth Circuit's liability standard is entirely unpredictable, the ensuing damage to efficient market behavior is entirely predictable. Firms with any degree of market power will be discouraged from engaging in aggressive buy-side price competition for fear that a jury might conclude that the prices paid were too high. And such firms will be discouraged from stockpiling inputs that managers believe might be needed for future use, lest a jury conclude, in retrospect, that such stockpiling was not "necessary." Rather than risk a jury condemning a particular purchase price as too high or unfair, and rather than hire a cadre of lawyers and economic consultants to attempt to justify every new proposed payment to a supplier, many firms will simply avoid vigorous competition when purchasing inputs. The need to subject every purchase pricing decision to legal review will likewise hinder rapid response to changing market condi-

tions. This is no academic concern. The front-line personnel who make purchasing decisions every day must now make those decisions against the specter of capricious liability imposed by the Ninth Circuit. And given the nationwide impact of the decision below, these businesspeople cannot wait for the issue to "percolate" further in the lower courts.

Price competition is "the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The Ninth Circuit's open-ended invitation for juries to second-guess decisions about the prices to be paid for goods and services will disrupt this central nervous system just as much as it would to impose the same standardless inquiry on the corresponding decisions about the prices at which those goods and services are sold.

Judges and juries are ill-equipped to administer the liability standard adopted by the Ninth Circuit, for neither can determine what prices are "fair" or "necessary" or how many inputs a particular company "needs." Thus, this Court and other courts have long rejected antitrust liability standards based on what juries would consider a fair or reasonable price. Indeed, one reason the Court has adopted *per se* rules on certain conduct is to avoid entangling juries in the impossible task of determining the reasonableness of prices. *See id.* at 220-221 (holding that if "the reasonableness of prices" were an issue under the Sherman Act, "its philosophy would be supplanted by one which is wholly alien to a system of free competition" and "[t]he reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures"); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow."). As the Court has explained, "it is exceedingly difficult to formulate even the term of the rule itself which should govern in the matter of determining what would be reasonable rates" because "there is such an infinite variety of facts entering

into the question of what is a reasonable rate, no matter what standard is adopted." *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-332 (1897).

As with similar standardless antitrust inquiries, when a court inquires into the reasonableness or fairness of prices, it chooses to "set sail on a sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (6th Cir. 1898) (Taft, J.). *See also Town of Concord*, 915 F.2d at 25 (Breyer, J.); Robert H. Bork, *The Antitrust Paradox* 22 (2d ed. 1993) (noting Court's holding that "a reasonable price standard was no standard"). Thus, the Court in *Brooke Group* set a high threshold for predatory pricing claims in part because a rule that seeks to police above-cost pricing decisions would be "beyond the practical ability of a judicial tribunal to control." 509 U.S. at 223. *See also* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 Geo. Wash. L. Rev. 1103, 1118-19 (2001) ("identifying [above-cost predation strategies] in the particular case without chilling aggressive, competitive pricing is far beyond the capacity of any antitrust tribunal"). That fact is no less true for profit-making purchasing decisions like those at issue here.

The open-ended, standardless inquiry endorsed by the Ninth Circuit does not permit businesses to conform their conduct to the law, and will disrupt a central activity upon which our free market economy is based. This Court's review is therefore warranted.

II. THE NINTH CIRCUIT'S DECISION WILL HINDER EFFICIENT MARKET BEHAVIOR NATIONWIDE.

The national importance of this case is manifest, for it directly affects an essential activity of all businesses: pricing. The Ninth Circuit permitted respondent to recover for losses that resulted from Weyerhaeuser's decision regarding what to pay for inputs, even though Weyerhaeuser failed to satisfy

the requirements for predatory conduct recognized in *Brooke Group*. Thus, the court held that a loser in the competitive process can recover treble damages for its inability to meet a rival's input purchase price—even if that inability results from the plaintiff's own inefficiency. Far from benefiting consumers, the Ninth Circuit's holding will harm them, by distorting and disrupting efficient market behavior.

The liability imposed in this case is truly extraordinary. Disregarding *Brooke Group*, the Ninth Circuit allowed a jury to penalize Weyerhaeuser based on a finding that it paid more than "necessary" or bought more than "needed," without any finding that Weyerhaeuser was not turning a profit or that its alleged predatory scheme had any chance of success. Weyerhaeuser was penalized without any allegation, much less proof, that it restricted its output or increased prices for consumers. Nor was there any allegation or proof that Weyerhaeuser paid so much for sawlogs that it was selling its finished lumber below cost; it is undisputed that the hardwood division operated at a profit throughout the alleged period of predatory buying. Pet. 5. And there is no question that Weyerhaeuser sold all of the alder lumber it could produce. *Id.* at 3. Nonetheless, the plaintiff cried foul because Weyerhaeuser was allegedly not maximizing its own potential profits and because the plaintiff could not pay the price for sawlogs that it wanted to pay. *Id.* at 5. The claim that Weyerhaeuser did not maximize its profits included no evidence that Weyerhaeuser was likely—let alone reasonably probable—to recoup its losses later. Thus, the crux of plaintiff's allegation was that it suffered harm because it was either unable or unwilling to match Weyerhaeuser's efficiency in bidding for sawlogs.

The Ninth Circuit believed that its decision would not disrupt efficient economic behavior because this case involves an allegation that the prices paid by Weyerhaeuser were too high, not too low. But the reasons for not subjecting pricing decisions to standardless oversight by juries apply regardless

of whether the allegation is predatory selling at too low prices or predatory buying at too high ones. There are myriad reasons why a company might rationally pay more to buy a particular input than its rivals are willing to pay, or purchase more of that input than it might be able to use at that moment—all of which are economically efficient. For example, a company may be willing to pay more for inputs to ensure a predictable and steady supply from a particular supplier; to recognize the reputability or reliability of a particular supplier; to increase its own output by encouraging increased supply of inputs; to meet a pressing need for inputs on an expeditious basis; or to reduce or eliminate transaction costs with sellers. Similarly, a company might stockpile inputs to meet a future anticipated demand or to ensure availability of supplies in the event of unanticipated disruption.

The reasons for purchase pricing decisions are limitless, as firms continually adjust the prices they pay for goods and services—both up and down—in order to meet ever-changing market conditions. Prices are the signals that the market sends to suppliers to ensure that resources are allocated efficiently in response to current conditions. Higher prices for inputs ensure that more are produced in order to meet market demand; lower prices discourage production. It is basic economics that when suppliers are paid more for an input, they will supply more to the extent they can. Because the price paid for the input is higher, any suppliers that can substitute into the production of the input will have an incentive to do so. Roger D. Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 66-67 (1993). More inputs will result in more finished products for sale to consumers, and more finished products on the market will result in lower prices. In this case, for example, just as loggers could withhold their timber from sale in hopes of receiving a higher price later, Pet. 4, they could also harvest their timber if the right price incentive existed. Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72

Antitrust L.J. 669, 676 (2005). Consumers benefit from these uninhibited, competitive, and non-collusive pricing decisions because accurate price signals ultimately result in the efficient allocation of resources across the entire economy. The Ninth Circuit's rule would disrupt these critical signals by dissuading firms from engaging in efficient price competition lest a jury conclude in hindsight that the prices paid were too high or the purchases too large.

Moreover, the Ninth Circuit's rule ignores that a rival's own inefficiency may account for the discrepancy between what it might be willing to pay for an input and what an efficient firm such as Weyerhaeuser might pay. A company with higher distribution costs due to a lack of innovation or other economic inefficiencies will be unable to pay the market price offered by more efficient rivals. Indeed, that appears to have been true in this case, where Weyerhaeuser was more efficient than the plaintiff, *see* Pet. 3, and was able to earn a profit notwithstanding the prices it paid for logs, whereas the plaintiff was not. And during the same time Ross Simmons incurred a loss and shut down, four new sawmills began operations and others expanded. *Id.*

Under the Ninth Circuit's analysis, however, if an efficient firm competes against a less efficient rival, the efficient firm must distort its own pricing decisions to make certain its rival can buy however much that rival needs at whatever price a jury would deem "fair." In other words, a company with a higher profit margin because of higher efficiency must conform its own pricing behavior to that of an inefficient rival, thereby ensuring the rival's continued survival. Such an outcome is anathema to the goals of the antitrust laws, which "were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis added) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). *See* Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001) ("It would be absurd to require the firm to hold a price umbrella over less

efficient entrants."). Such a rule discourages innovation and efficiency, and encourages inefficiency, all to the ultimate detriment of consumers. "[A] firm should not be penalized for having lower costs than its rivals and pricing accordingly." Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 154 (2005) (citing Posner, *supra*, at 194-195).

Even a company whose pricing forces a rival to exit the market is not condemned if the pricing is profitable, for "[s]uch behavior is completely consistent with our conception of proper competition." Hovenkamp, *supra*, at 156. There is a reason for the *Brooke Group*'s high liability standard in predatory pricing cases. "Competitive and exclusionary conduct look alike." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 972 (1986). In the context of predatory pricing, not only is there a danger of confusing the two and chilling procompetitive conduct, but economic rationality makes predatory pricing decisions rare and self-deterring.[3]

Predatory buying is particularly unlikely to succeed, since the perpetrator must recoup its losses by later lowering its purchase price, which "will succeed only in eliminating sources of inputs by driving potential suppliers out of the input market." Jack A. Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 Loyola Univ. L. Rev. 857, 865 (1987). Whereas very high barriers to *entry* might theoretically sustain a pre-

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[3] *See Brooke Group*, 509 U.S. at 226 ("As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are high.") (internal citation omitted); *Matsushita*, 475 U.S. at 595 ("economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the [predator]").

datory *selling* scheme, there are few if any insurmountable barriers to *exit* for suppliers affected by the end stage of a predatory *buying* scheme. In both predatory buying and selling, then, the high likelihood of false positives outweighs the small likelihood of undetected schemes. While true predation is self-correcting over time, there is no market correction for imposing liability on, and therefore deterring, beneficial conduct. Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law*, 52 Emory L.J. 1401, 1412-13 (2003).

The difference between legitimate competition and unlawful predatory conduct already requires "the most subtle of economic judgments about particular business practices." *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). *Brooke Group* recognizes that liability must be carefully circumscribed, so as not to deter pro-competitive conduct in the zeal to root out highly improbable anti-competitive schemes. By contrast, inquiries into the "fairness" of prices and the "necessary" levels of purchases by each competitor would do just that. At the end of the day, the ultimate losers from the chill cast on competition are consumers—the very group the antitrust laws were designed to protect. The Court should therefore grant review to ensure that companies will not be deterred from engaging in efficient pricing decisions by the specter of enormous liability meted out by juries under vague and unworkable standards.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

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